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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 533.

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., and H. B. DAY CO., INC.,

Petitioners,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., and GRAMERCY QUALITY LAUNDRY CO., INC.,

Respondents.

RESPONDENTS' BRIEF.

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THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Opinions Below 1

Jurisdiction 1

Statement of the Case 1

Question Presented 2

Statutes Involved 2, 18, 19

Summary of Argument 2

Argument 3

A mortgage foreclosure action in which a receiver to collect rents has been appointed for the benefit of the plaintiff and other lienholders, is not an "equity receivership" within the meaning of Section 77-B 3

In the construction of a statute the intent of Congress must be given effect 6

The legislative history of the Act confirms the view that the phrase "equity receivership" was employed in its common acceptation and usage 8

The reasons for the appointment of a foreclosure receiver and for a general equity receiver are firmly embedded in the law 9

Subdivision (i) was enacted to cover the case of a corporation having property outside of the jurisdiction of the appointing court 14

Section 77-B was enacted for the relief of debtors 15

Conclusion 17

Appendix 18

CITATIONS:

CASES:

In re Berdick, 56 Fed. (2d) 288 13
In re Brosc, 254 F. 664 (C. C. A. 2) 13

In re Commonwealth Bond Corporation, 77 F. (2d) 308 17
Continental Ill. Nat. B. & T. Co. v. *Chicago R. I. & Pac. R. R. Co.*, 294 U. S. 648, 672 14

In re Draco Realty Corp., 11 Fed. Supp. 405 5

Ebert v. *Poston*, 266 U. S. 548, 554 ..... 6, 8

In re Flamingo Hotel Co., D. C. E. D. Ill. (not officially reported) .. 5
Freedman's Savings & Trust Co. v. *Shepherd*, 127 U. S. 494 11

Gillett v. *Moody*, 3 N. Y. 479 11
Gordon v. *Washington*, 295 U. S. 30, 38 14
In re Granada Hotel Corp. (D. C.), 9 Fed. Supp. 909, affirmed 78 F. (2d) 409, cert. gr. *sub nom. Tuttle* v. *Harris*, No. 428, October, 1935, Term 6
Gross v. *Irving Trust Company*, 289 U. S. 342 13

PAGE

Harkin v. *Brundage*, 276 U. S. 36 13
Helvering v. *New York Trust Company*, 292 U. S. 455, 464 ..... 6, 7
Hollenbeck v. *Donnell*, 94 N. Y. 342 11
Home Title Insurance Company v. *Isaac Sherman Holding Corporation*, 240 App. Div. (N. Y.) 851 10

In re Laclede Gas Light Co., D. C. E. D. Mo. (not officially reported) 5
Lincoln Savings Bank v. *Realty Associates*, 67 Fed. (2d) 895 (C. C. A. 2) 13

Ozawa v. *United States*, 260 U. S. 178, 194 6

Porter v. *Williams*, 9 N. Y. 142 11

In re Surf Building Corp., D. C. E. D. Ill. (not officially reported) .. 6
Standard Accident Insurance Company v. *E. T. Sheftel & Co.*, 53 F. (2d) 40, 41 C. C. A. 4 14
Stephens v. *Meriden Britania Co.*, 160 N. Y. 178, 183 12
Sullivan v. *Rosson*, 223 N. Y. 217 11

U. S. Trust Company v. *N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 478, 483, 486 12

W. I. M. Corp. v. *Cipulo*, 216 App. Div. (N. Y.) 46 10
In re Watts & Sachs, 190 U. S. 1 13
Worthen Co. v. *Kavanaugh*, 295 U. S. 56, 62 11

STATUTES:

Bankruptcy Act, 11 U. S. C. A. Section 1 (15) 19
Bankruptcy Act, Section 3 (a) (5); 11 U. S. C. A.
Section 21 (a) (5) 14, 19
Section 77A; 11 U. S. C. A. Section 207 15
Section 77B (a); 11 U. S. C. A. Section 207 (a) 3, 9, 14, 18
Section 77B (i); 11 U. S. C. A. Section 207 (i) 3, 14, 19
Judicial Code, Section 240 (a) 1
New York State General Corporation Law, Arts. 6 and 10, Ch. 23, Cons. Laws 12
Real Property Law (N. Y.), Section 254 10

OTHER AUTHORITIES CITED:

Commerce Clearing House, Inc. Bankruptcy Law Service, pages 857-864 9
Commerce Clearing House, Inc. Bankruptcy Law Service, pages 1101-1103, par. 3001 5
Congressional Record:
73 Cong. Rec. (1-2 Sess.) page 202 9
78 Cong. Rec. 7800, 7905-7907 9
Dodd Reorganizations Through Bankruptcy:
A remedy for what? 48 Harv. L. Rev. (1935) 1100 9
Friendly, in *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. (1934) 39, 54, Note 57 ..... 5, 8

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Respondents.

RESPONDENTS' BRIEF.

Opinions Below.

The opinion of the District Court (R. 10-11) is reported in 11 Fed. Supp. 404. The opinion of the Circuit Court of Appeals (R. 17-21) is reported in 78 Fed. 2d 678.

Jurisdiction.

This Court granted a petition for certiorari on November 25th, 1935 (R. 23). U. S. ; 56 Sup. Ct. 248. Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925 (28 U. S. C. A. 347).

Statement of the Case.

The statement of the case made by petitioners, correctly sets forth the material facts. In addition to the statement made, it may be noted from the

schedule annexed to the petition that the total unsecured debts, listed as accounts payable, are set forth as $3,375.31 (R. 7), of which the petitioners herein allege they are due a sum in excess of $1,000 (R. 4). The petition for adjudication was dismissed on motion of other creditors of the debtor corporation (R. 7-9).

Question Presented.

Is a mortgage foreclosure action involving real estate, in which a Receiver has been appointed to collect the rents and profits for the benefit of the plaintiff in said action, an "equity receivership" within the meaning of Section 77-B of the Bankruptcy Act?

Statutes Involved.

These are set forth in the Appendix (*infra,* pp. 18-19).

Summary of Argument.

A mortgage foreclosure action in which a receiver to collect rents has been appointed for the benefit of the plaintiff and other lien holders, is not an equity receivership within the meaning of the Statute. It is the duty of this Court to give effect to the intent of Congress; that primarily this intent is to be ascertained by giving the words used their natural and literal significance; but that if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, rules of construction require further investigation into the reason of the enactment and its history; that the Statute will be given the effect that Congress intended, sacrificing, if necessary, the literal meaning; that other parts of the

statute must be considered, and that a construction, strictly according to the letter, without regard to the legislative intent, is not to be desired.

The phrase "equity receivership" has a common acceptation and usage. It refers to an action in which, on the bill of a creditor or a stockholder of the corporation, a receiver is appointed to save the business, if possible, or to liquidate and distribute ratably the assets among all creditors. There is a well defined distinction between a receiver of a corporation or over the property of a corporation, and a receiver to collect rents in a foreclosure action. Unless the phrase "equity receivership" is given the meaning that the Bench and Bar have understood it to mean, and which it is to be presumed Congress intended it to mean, it leads us to an unreasonable result. Since it is conceded that there is no such thing as a proceeding in equity receivership, the phrase is ambiguous and subject to construction.

Argument.

A mortgage foreclosure action in which a receiver to collect rents has been appointed for the benefit of the plaintiff and other lien holders, is not an "equity receivership" within the meaning of Section 77-B.

Under Section 77-B, sub-division (a), three creditors having claims amounting to $1,000 or over, may file "a petition stating (among other things) that such corporation is insolvent or unable to meet its debts as they mature and, *if a prior proceeding in bankruptcy or equity receivership is not pending,* that it has committed an act of bankruptcy within four months". Sub-division (i) of the same section further provides: "If a receiver or trustee of all or any part of the property of a corporation has been

appointed by a Federal, State or territorial Court * * * a petition or answer may be filed under this Section, at any time thereafter by the corporation, or its creditors, as provided in sub-division (a) of this section."

The single question presented on this appeal hinges upon the definition to be given to the words "equity receivership" to be found in sub-division (a).

In the case at bar petitioners allege they have provable claims against the corporation, in excess of $1,000 (R. 2); that the corporation was unable to meet its debts as they matured, and that it had committed an act of bankruptcy within four months preceding the filing of the petition (R. 4). It was conceded by petitioners in both Courts below, and is now conceded in petitioners' brief (p. 4), that the petition does not allege an act of bankruptcy. They insist, however, that there are sufficient allegations of fact set forth in the petition to show that there was *an equity receivership pending* within the meaning of the Statute. Succinctly, these facts consist of the allegation that receivers were appointed by the Supreme Court of the State of New York in a mortgage foreclosure action effecting property of the corporation, and that these receivers were receiving and administering the income *for the benefit of the plaintiff in that action* (R. 3). It may be noted that if this mortgage foreclosure action in which the receivers were appointed, is an *equity receivership,* then the necessity of alleging an act of bankruptcy does not exist.

The District Court and the Court of Appeals decided that these words were subject to construction; that they referred to a receivership of the general type, known as the conservation suit, or where a stockholder has brought a bill in equity; that during

the progress of the bill Congress was familiar with this type of receivership; that the phrase is used in apposition to the clause "a prior proceeding in bankruptcy"; that the rule of *ejusdem generis* is applicable; that this form of receivership, where the business cannot be saved, like bankruptcy, looks to a liquidation of assets and an equitable distribution among creditors; that the legislative plan was to aid a distressingly large number of corporations which had been or were in danger of being placed in bankruptcy or equity receivership of the general type described, and that the purpose of the legislation was to supersede proceedings looking to liquidation by proceedings looking to reorganization. Accordingly, it was held that a mortgage foreclosure action in which a receiver was appointed, was not an equity receivership (R. 10-11, 17-21).

The same conclusion was reached by another District Court in *In re Draco Realty Corp.* (D. C. S. D. N. Y.), 11 Fed. Supp. 405. See also *In re Laclede Gas Light Co.* (D. C. E. D. Mo. June 26, 1934, not offically reported).[1] Opposed to these decisions are three cases arising in the Eastern District of Illinois, wherein Judge Lindley held that a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" within the meaning of Section 77-B. *In re Flamingo Hotel Co.*[2] (Aug. 9, 1934,

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1 This opinion appears in the bankruptcy law service of Commerce Clearing House, Inc., pages 1101-1103, paragraph 3001.

2 Friendly, in *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. (1934) 39, 54 (Note 57), states his view of the conflict between the *Laclede* and the *Flamingo* cases as follows:

> "* * * The decision in the *Flamingo Hotel* case, E. D. Ill., Aug. 9, 1934 is *contra*. *It is submitted that the Laclede decision is correct, and that the term 'equity receivership' should be restricted to proceedings initiated by the filing of a general creditor's bill* and should not be applied to proceedings purely for the enforcement of liens even though such proceedings involve the appointment of a receiver of the property subject to the lien." (Italics ours.)

not officially reported); *In re Surf Bldg. Corp.* (Oct. 17, 1934, not officially reported); and *In re Granada Hotel Corp.* (D. C.), 9 Fed. Supp. 909. The case last cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit, in a short per curiam opinion, 78 F. (2d) 409 (rehearing denied July 26, 1935).

The *Granada Hotel* case is now before this Court *sub nom. Tuttle* v. *Harris,* No. 428, and the argument of which, it is expected, will precede that of the case at bar.

In the Construction of a Statute the Intent of Congress Must be Given Effect.

Ozawa v. *United States,* 260 U. S. 178, 194;
Helvering v. *New York Trust Company,* 292 U. S. 455, 464;
Ebert v. *Poston,* 266 U. S. 548, 554.

In the *Ozawa* case, *supra,* Mr. Justice Sutherland, in the opinion of the Court, stated (p. 194):

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look into the reason of the enactment and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.,* 93 U. S. 634, 638."

In *Helvering* v. *New York Trust Company, supra,* Mr. Justice Butler, writing the opinion for the majority of the Court, said (p. 464):

> "The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language, is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commissioner of Immigration* v. *Gottlieb,* 265 U. S. 310, 313; *Bate Refrigerator Co.* v. *Sulzberger,* 157 U. S. 1. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne,* 19 How. 183, this Court said (p. 194): 'It is well settled that, in interpreting a statute, the Court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' * * *.
>
> In *Barret* v. *Van Pelt,* 268 U. S. 85, this Court applied the rule laid down in *People ex rel. Attorney General* v. *Utica Ins. Co.,* 15 Johns. 358, 381, that 'a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers * * *.'"

In *Ebert* v. *Poston, supra,* Mr. Justice Brandeis, in the opinion of the Court, stated (p. 554):

> "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

The Legislative History of the Act Confirms the View That the Phrase "Equity Receivership" Was Employed in Its Common Acceptation and Usage.

When we pause to consider the conditions which existed when the statute was enacted, we find that an unusual number of bankruptcy proceedings, voluntary and involuntary, were pending. In addition thereto, a great many general equity receiverships, as we ask the Court to construe that phrase, and as it has been commonly understood and accepted by the Bench and Bar, were in existence. Something had to be done to evolve a plan for the benefit mainly of the corporation.

Bankruptcy and equity receivership, where the business cannot be saved, contemplated the liquidation of the assets and other equitable distribution among creditors, all at a great loss and sacrifice, not only to creditors, but to the corporation itself. It was the design and purpose of the Courts to prevent this very condition that the statute was enacted. The legislative history[3] of the act makes the conclusion

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[3] For the legislative history of Section 77B, *see* Friendly, *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. (1934), 39, 49, *et seq.*

As originally drafted, Section 77B (H. R. 5884) contained no provision authorizing creditors to petition for involuntary reorganizations. The bill was proposed by Mr. McKeown. When, in the course of hearings before the House Judiciary Committee, Mr. McKeown was requested to state his reasons for the absence of a provision authorizing creditors to petition for involuntary proceedings, he replied:

> "The reason we do not apply it to creditors is this: Any corporation that becomes insolvent or unable to meet its debts as

irresistible that it was a receivership which effected such a result, that Congress had in mind when it used this phrase in Section 77-B, and that a Receiver to collect rents in a mortgage foreclosure action was not intended or contemplated.

A consideration of the statute as a whole leads us, it is respectfully submitted, to the same result. As may be observed, the phrase "equity receivership" immediately follows the words "a prior proceeding in bankruptcy". Again, at almost the very beginning of Section 77-B, subdivision (a) it provides that where the petition or answer is approved, the Court shall have and may exercise all the powers which a Federal Court would have, had it appointed a Receiver in equity of the property of the debtor, by reason of its inability to pay its debts as they matured.

The Reasons for the Appointment of a Foreclosure Receiver and for a General Equity Receiver are Firmly Embedded in the Law.

We submit that the construction for which we contend is made clear when we consider the respective powers, duties and rights of a receiver in a mortgage foreclosure action, with those of a general receiver.

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they mature—the creditor has a very drastic remedy. *He has the remedy of the receivership, a Federal receivership immediately.* He goes in and can put the corporation either into involuntary bankruptcy or into the hands of a receiver. For that reason we did not want to impair his rights to go in at any time, and we saw no necessity why a creditor should want to reorganize when he puts the corporation in involuntary bankruptcy *or into a receivership.* The Corporation, if it wants to reorganize, can come in and save itself." (Italics ours.) (U. S. Judiciary Committee (House) Hearings, 73 Cong. (1-2 Sess.), p. 202.)

See also House Judiciary Report on Section 77B of the Bankruptcy Act. (This report is conveniently set out in the Bankruptcy Law Service of Commerce Clearing House, Inc., pp. 857-864.) Dodd, Reorganizations through Bankruptcy: A Remedy for What? 48 Harv. L. Rev. (1935) 1100; 78 Cong. Rec. 7890, 7905-7907.

In New York, under the old Chancery practice, the Court would not appoint a Receiver in a foreclosure action unless it was satisfied that the person liable for the debt was insolvent, or that the security was inadequate, even though there was a stipulation in the mortgage providing for the appointment of a receiver. (*W. I. M. Corporation* v. *Cipulo,* 216 App. Div. (N. Y.) 46 (1926).) Subsequent to this decision, and in 1930, the law was amended. Under the amendment it was provided that where a mortgage contained a provision for the appointment of a Receiver in the event of default, such provision *must* be construed as meaning that the mortgagee is entitled to the appointment of a receiver, *without notice and without regard to the adequacy of the security for the debt.* (Section 254, subdivision 10, Real Property Law of the State of New York, added by Chapter 166, laws of 1930;[4] *Home Title Insurance Co.* v. *Isaac Sherman Holding Corporation,* 240 App. Div. (N. Y.) 851 (1933).) Thus the appointment of a receiver in a foreclosure action is very often determined by the provisions of the mortgage.

The receivers appointed in the foreclosure action described in the petition in the instant case, were appointed under this very subdivision. These receivers are not receivers of the property of the cor-

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[4] Laws of 1930, Chapter 166, adding subdivision 10 to Section 254, Real Property Law, provides:

> "10. Mortgagee entitled to appointment of receiver. A covenant 'that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness."

poration, as that phrase was intended by Congress in subdivision (i). They are receivers to collect rents and profits, and as the record shows, for the benefit of the plaintiff in the foreclosure action, the parties thereto and those for whose benefit the receivership is extended. (See *Freedman's Savings & Trust Company* v. *Shepherd,* 127 U. S. 494, followed in *Sullivan* v. *Rosson,* 223 N. Y. 217.) The object of the appointment of such a receiver is to preserve the property *pendente lite* and to give a priority of lien on the rents and profits of the premises, so that they may be applied to payment of plaintiff's claim. (*Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 62; *Gillette* v. *Moody,* 3 N. Y. 479; *Porter* v. *Williams,* 9 N. Y. 142.) Such a receiver does not take possession of all of the assets of the corporation in the district of the appointing court, nor is he entitled to the possession of the books and records of the corporation. If the mortgage covered ten parcels of real property, and a receiver of one parcel would be sufficient protection for him, then a receiver of only that parcel will be appointed. (*Hollenbeck* v. *Donnell,* 94 N. Y. 342.) Such a receiver cannot sue for the recovery of the property, debts and things in action of the corporation. He does not represent the creditors of the corporation or its stockholders. His activities are confined to the preservation of the property pending the foreclosure action, the collection of the rents for the benefit of the plaintiff, in case there is a deficiency and for the benefit of other specific lienholders who are parties to the action in case there is a surplus. We submit that by no stretch of the imagination can he be logically considered a receiver of the corporation or over its property.

In an equity receivership, we find an entirely different situation. There the receiver takes posses-

sion of all of the property of the corporation in the district of the appointing court; creditors secured and unsecured are restrained from prosecuting actions against the corporation; provision is made for the filing of claims by creditors; for the marshalling of assets, and if there is no hope for saving the business, the liquidation thereof and the ratable distribution among creditors. The proceeding takes on all the aspects of a bankruptcy proceeding.

A foreclosure receiver is not unlike a receiver appointed in supplementary proceedings. In the former case, the appointment is made primarily for the benefit of the plaintiff in the foreclosure action, and in the latter case his appointment is made for the benefit of the creditor who procured his appointment, and such others as may have caused the receivership to be extended to their claims. *Stephens* v. *Meriden Britania Co.,* 160 N. Y. 178, 183. An equity receiver acts for the benefit of all creditors of the corporation, irrespective of how his appointment came about. *United States Trust Co.* v. *N. Y., West Shore and Buffalo Rwy. Co.;* 101 N. Y. 478.

Aside from the inherent power of a court of equity to appoint a general receiver in a proper case, the statutes of New York elaborately provide for the judicial supervision of a corporation by a receiver. (See Articles 6 and 10, General Corporation Law, State of New York, Chapter 23, Consolidated Laws.) Almost every other state contains similar statutes. In the case at bar, the foreclosure receiver was appointed because of a stipulation in the mortgage providing for such appointment, and he was not a general receiver such as a court of equity appoints in the judicial supervision of a corporation, or which the statutes of the various states provide for.

We approach a solution of the problem from another angle. As may be noted from the record, the foreclosure action was commenced on or about October 15th, 1934, and the receivers were appointed and went into possession on or about December 19th, 1934 (R. 3), which was long before the filing of the petition for adjudication. Had the corporation filed a voluntary petition in bankruptcy, it is settled that the trustee in bankruptcy would not be entitled to possession of the property or of the rents and profits which the foreclosure receivers had collected and were collecting. (See *In re Brose,* 254 F. 664 (C. C. A. 2); *In re Berdick,* 56 Fed. (2d) 288; *Lincoln Savings Bank* v. *Realty Associates,* 67 Fed. (2d) 895 (C. C. A. 2).)

Had the receivers in possession been general equity receivers in an insolvency proceeding, the supervening bankruptcy of the corporation would immediately oust the State Court of jurisdiction, under the now settled principle that the bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy is exclusive in the administration of the affairs of insolvent persons and corporations. (*Gross* v. *Irving Trust Company,* 289 U. S. 342; *In re Watts & Sachs,* 190 U. S. 1.). The reason for this is manifest. The appointment of a foreclosure receiver is primarily for the parties to the foreclosure action, who are usually holders of specific liens against the property, while the appointment of a general equity receiver is for the benefit of all creditors and stockholders. (See also *Harkin* v. *Brundage,* 276 U. S. 36.)

Prior to the enactment of Section 77-B, it was held that the appointment of a receiver in a foreclosure action did not constitute an act of bankruptcy,

even though the bankruptcy act[5] provides that it is an act of bankruptcy where a receiver has been put in charge of a person's property, while he is insolvent. (See *Standard Accident Insurance Co.* v. *E. T. Sheftel & Co.*, 53 Fed. (2d) 40-41, C. C. A. 4.)

Petitioners concede that there is no such thing as a proceeding in equity receivership, and that a suit that looks merely to the appointment of an equity receiver must be dismissed (*Gordon* v. *Washington*, 295 U. S. 30, 38). We submit that since there is no such proceeding as equity receivership, the phrase is ambiguous, and it should be given the meaning that Congress intended. This Court, in the case of *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U. S. 648, 672, has used this phrase "equity receivership" to represent, we believe, the type of action that, we urge, Congress intended.

Subdivision (i) Was Enacted to Cover the Case of a Corporation Having Property Outside of the Jurisdiction of the Appointing Court.

It is contended that subdivision (i) indicates an intent on the part of Congress to embrace within the provisions of Section 77-B, a receiver appointed in a foreclosure action. It will be recalled that by this section, a petition *under subdivision* (*a*) may be filed by creditors, where a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial Court.

It seems clear to us that subdivision (i) was enacted to cover the case of a chain store corporation, having property in more than one state. If an equity

[5] Section 3 (a) (5) Bankruptcy Act; 11 U. S. C. A. Sec. 21 (a) (5) (Appendix, *infra*).

receivership came into existence in one state, covering only a part of the corporation's total property, that condition would satisfy the statutory requirements. As the Court of Appeals said in the case at bar (R. 20-21):

> "In the case at bar the mortgage covered all of the debtor's property, but the logic of the appellant's position as they concede, compels them to argue for the same results, however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true refers to the appointment of all or any part of the property of a corporation. This, we think, contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings."

Section 77-B Was Enacted for the Relief of Debtors.

We respectfully submit that to construe the phrase "equity receivership" as meaning the appointment of a receiver in any action, suit or proceeding, irrespective of the end sought, does violence to the purpose and intent of Congress. It would lead to "an unreasonable result, plainly at variance with the policy of the legislation as a whole". The law was enacted primarily "for relief of debtors" (Section 77-A).

We take the liberty to suggest a situation which might serve to illustrate the danger of sustaining petitioners' argument. The X corporation is the owner of five parcels of real estate. One of these it acquired about a year ago, with the hope that it might prove profitable. At the time of its acquisition, the corporation executed no bond, mortgage or agree-

ment, in which it became obligated to pay the mortgage indebtedness. It assumed none of the obligations with respect to this parcel, but purchased the same subject to all the liens and encumbrances thereon. After one year of operation, the corporation finds the retention of this parcel to be unprofitable. It is perfectly willing to let it fall by the wayside. The corporation is eminently solvent, though temporarily embarrassed for lack of cash. In connection with this particular parcel, the holder of a mortgage thereon has a right to apply *ex parte* for the appointment of a receiver, to collect rents. The receiver is appointed. The corporation is not in need of any reorganization. A great many of its creditors are satisfied that it is to the best interests of all concerned to keep the corporation out of court. *Quaere*: Was it the intention of Congress, under the assumed facts, to confer upon creditors the right to subject this corporation and its property to the jurisdiction of a bankruptcy court?

Petitioners argue, however, that other provisions of the statute protect the corporation. It is said that the "good faith" provision is a safeguard against the haphazard or unscrupulous use of the involuntary petition. In reply, we ask why the corporation under the hypothetical case should even be subjected to the expense of defending that issue. In such case a corporation would probably be doing more to help its creditors by abandoning the particular property or by selling the deed for a nominal sum, than it would be doing if it attempted to retain the property and the burdens that go with it.

It is further urged by petitioners that the creditors should not be left to the mercy of the debtor's own board of directors, which "through dead-lock, lack of direct interest, other motives or mere indolence" may be finable or unwilling to help them. We hope that the court will not indulge in such an im-

probable presumption. If the corporation finds it necessary to avail itself of Section 77-B, the statute makes ample provision for its invocation, without the necessity of alleging "a pending equity receivership". If the corporation does not desire to avail itself of this section, the creditor is not without a remedy, for that section did not in any way repeal the bankruptcy act, or take away from the creditor the right to have appointed a general equity receiver, but merely conferred additional jurisdiction pursuant to its provisions, upon the Bankruptcy Court. After all, a fair and reasonable view requires the conclusion that a corporation will always take such steps as the law provides for the conservation, preservation and protection of its desirable property.

The case at bar is probably the best illustration of the danger of petitioners' argument. The corporation, it has been adjudicated by the Supreme Court of the State of New York, was a mere trustee for the benefit of others, of the property, which was the subject matter of the foreclosure action; that it had no beneficial interest in the property. Since the decision by the Circuit Court of Appeals in this case, the foreclosure action has been discontinued and the receivers to collect the rents have been discharged and the property is now being operated for the benefit of the real owners (see *In re Commonwealth Bond Corp.*, 77 F. (2d) 308).

CONCLUSION.

The decision of the Circuit Court of Appeals should be affirmed.

Dated, New York, January 11th, 1936.

Respectfully submitted,

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Counsel for Respondents.

Appendix.

Section 77-B (a) Bankruptcy Act as amended, Title 11 U. S. C. A., Section 207 (a), provides, so far as material, as follows:

> "* * * If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this action, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature."
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> * * *
>
> "Three or more creditors who have probable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, *if a prior proceeding in bankruptcy or equity receivership is not pending,* that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition." (Italics ours.)

Section 77-B (i), 11 U. S. C. A., Section 207 (i), provides:

> "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court * * *, a petition or answer may be filed under this section and any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section * * *."

Section 3 (a) (5) Bankruptcy Act, 11 U. S. C. A., Section 21 (a) (5), provides:

> "ACTS OF BANKRUPTCY. (a) Acts of bankruptcy of a person shall consist of his * * *; or (5) made a general assignment for the benefit of his creditors, or, while insolvent, a receiver or a trustee has been appointed, or put in charge of his property; * * *."

Section 1 (15) Bankruptcy Act, 11 U. S. C. A., Section 1 (15), provides as follows:

> "SECTION 1, MEANING OF WORDS. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * * (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, as a fair valuation, be sufficient in amount to pay his debts * * *."